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Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1986

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KENNETH L. WRONKE,

Petitioner,

vs.

JOHN O. MARSH, et al.,

Respondents.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

—o—

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QUESTION PRESENTED

Whether, under a proper interpretation of Army Regulation 135-175, ¶ 2-5(a) in a court marshal proceeding, a United States Army Board of Officers must give binding effect to an administrative finding of a National Transportation Safety Board's decision favorable to a respondent officer.

PARTIES TO THE PROCEEDING

The petitioner is Kenneth L. Wronke.

The respondents are John O. Marsh, in his capacity as Secretary of the Army of the United States of America, Lt. General John R. McGiffert, in his capacity as Commander for the Fifth Army of the United States of America, General Kenneth Printen, in his capacity as Commander of the 30th General Hospital, United States Army Reserve, Colonel Robert L. Brewer, United States Army Reserve, Lt. Colonel Paul J. Beachem, United States Army, Lt. Colonel Dennis D. Rosengard, United States Army Reserve, and Lt. Colonel Clarence W. Delannoy, United States Army Reserve.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit entered in this proceeding on April 4, 1986.

OPINION BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is reported at 787 F.2d 1569. A copy of the opinion is included in the Appendix as Exhibit A.

JURISDICTION

Jurisdiction in this cause is premised upon 28 U.S.C. § 1254(1) for review by certiorari of the judgment and opinion of the United States Court of Appeals for the Federal Circuit. A written opinion was issued by that court on April 4, 1986. Petitioner, Kenneth L. Wronke, filed a petition for rehearing with suggestion for rehearing *in banc*. The petition for rehearing was denied on May 7, 1986, and a copy of the court's order is included in the Appendix as Exhibit B. On May 20, 1986 the court denied petitioner's request for rehearing *in banc*, with a copy of the order being included in the Appendix as Exhibit C.

Petitioner filed a motion to stay the mandate in this cause pending the filing of his petition for writ of certiorari to this Court. This motion was denied by the Court of Appeals on May 6, 1986, and on May 18, 1986 the mandate was returned and the record in this cause was lodged with the Clerk of the United States District Court for the Central District of Illinois, Danville, Illinois. Although the mandate has issued, the United States Supreme Court has jurisdiction to review the decision of the United

States Court of Appeals for the Federal Circuit, regardless of the status of the mandate. *Carr v. Zaja,* 283 U.S. 52, 53 (1931); *Aetna Casualty Co. v. Flowers,* 330 U.S. 464, 468 (1947).

———o———

STATEMENT OF THE CASE

Petitioner Kenneth L. Wronke was affiliated with the United States Armed Forces in excess of 26 years, and attained the rank of major. During that time he was on active duty with both the Army and Navy, the most recent being with the Army during the Vietnam conflict. After his active duty in Vietnam, petitioner served in the Army Reserves until receiving a discharge order on June 14, 1982.

In October of 1977 the petitioner made application to the Federal Aviation Administration for a civilian pilot's license. To support his application he submitted various military forms and orders and completed a written test. During the same month, the FAA issued a civilian commercial certificate to the petitioner.

Included in the forms presented by petitioner to the FAA to obtain his license were military forms DA 759 and 759-1 to demonstrate flight hours and qualifications from his military affiliation. In his application to the FAA, petitioner submitted records and orders relating to his military flight missions, number of hours flown, and aircraft qualifications, but he made no intentional representation to the FAA that he was a "Rated Army Aviator".

In May of 1978 during later verification of petitioner's flying status from his reserve commander, FAA officials were advised Wronke was not a "Rated Army Aviator". Petitioner's civilian certificate was subsequently revoked by the FAA, and the decision was upheld by an FAA administrative law judge. The revocation decision was appealed to the National Transportation Safety Board (NTSB), and in November of 1978 that agency upheld the revocation on the basis that petitioner was not a "Rated Army Aviator". The NTSB, however, specifically found that petitioner had not acted wilfully in submitting the military documentation of his flying qualifications to the FAA, or in misrepresenting himself as an Army pilot, and in its opinion stated:

> In the absence of any probative evidence that respondent's application was based on a deliberate intent to mislead the FAA,[14] we are not persuaded that barring a new application for a full year would serve any meaningful safety purpose.

---

[14] Rather, it appears the application was more the result of a lack of understanding of pertinent FAA and military standards.

NTSB opinion and order, *Bond v. Wronke*, No. SE-3963 (11/13/78).

In December of 1979 the petitioner received notice from the Army of the initiation of an Officer Elimination Action against him. One charge, under AR 135-175, ¶ 2-12(d), alleged petitioner made intentional false representations in submitting the military forms to obtain his civilian pilot's license; and the second charge, under AR 135-175, ¶ 2-12(o), alleged petitioner's conduct was unbecoming an officer.

In January of 1981, an Army Officer Elimination Board ruled that petitioner had wrongfully used military forms DA 759 and 759-1 to obtain a civilian pilot license and further, that he demonstrated a pattern of conduct that these actions were intentional. The elimination board made a further finding that the NTSB opinion, which reflected that petitioner's actions were not wilful, was not binding on them. The board's recommendation of elimination and a general discharge under honorable conditions was reviewed and accepted in June of 1982, and petitioner received notice of the decision and a General Discharge Order effective June 14, 1982.

In July of 1982, petitioner commenced an action in the United States District Court for the Central District of Illinois, Danville, Illinois, seeking reinstatement in the Army Reserves. Petitioner's complaint was dismissed by the district court on the basis that he had not exhausted his administrative remedies through the Army Board for Correction of Military Records (ABCMR) under 10 U.S.C., § 1552, and the Court of Appeals for the Seventh Circuit affirmed the dismissal. During the appeal process, petitioner availed himself of intra-service remedies by the filing of an application for relief with the ABCMR, and in April of 1983 was denied relief by that agency.

The present case originated in August of 1983 when petitioner filed his second complaint with the United States District Court for the Central District of Illinois. In February of 1986, the district court granted petitioner relief on the basis that respondents had failed to adhere to their own regulations, AR 135-175, ¶ 2-5(a), which provided:

> No officer will be considered for elimination for the reasons in paragraph 2-11 or 2-12 because of conduct that has been the subject of judicial proceedings resulting in an acquittal based on the merits of the case or in an action having the same effect.

The court held the NTSB opinion that petitioner's actions were not wilful or deliberate misrepresentation was binding on the respondents and, further, that the NTSB opinion and order was "an action having the same effect as a judicial proceeding resulting in an acquittal based on the merits." The court recognized established rules regarding judicial review of the Army's interpretations of its own regulations, but held the respondents' interpretation was unreasonable, erroneous and inconsistent; and further, that any deference to be afforded respondents was outweighed by the significance of petitioner's complaint, the injury to him, the minimal interference with military operation, and the lack of military expertise involved in making a decision. A copy of the district court's opinion is included in the Appendix as Exhibit D.

The court ordered petitioner reinstated in the Army Reserves and awarded back pay not to exceed $9,999.99. Petitioner had limited his damages request to $10,000 to bring his case within the Tucker Act, 28 U.S.C., § 1346(a)(2). Respondents filed a motion for reconsideration under the purported authority of F.R.Civ.P. 60(b). In support of their motion, respondents submitted two legal opinions from the Judge Advocate General of the Army (JAG) providing legal advice to the ABCMR and the respondents concerning petitioner's case. No post-trial motion was filed by respondents. The district court denied this motion to reconsider on April 29, 1984. The district court's opinion is reported at 603 F.Supp. 407 (C.D.Il., 1985).

Respondents filed a notice of appeal to the Seventh Circuit Court of Appeals, but later moved to transfer the appeal pursuant to 28 U.S.C., § 1631, to the Federal Circuit. Recognizing that jurisdiction in petitioner's case was based on the Tucker Act, 28 U.S.C., § 1346(a)(2), the Seventh Circuit transferred the case. *Wronke v. Marsh,* 767 F.2d 354 (7th Cir. 1985).

On April 4, 1986, a panel of the Court of Appeals for the Federal Circuit reversed the judgment of the district court. The court held that the district court had misread the provisions of ¶ 2-5(a) of AR 135-175. The court held that the plain reading of the provision, using proper English grammar rules, dictated there was only one type of "proceedings" in ¶ 2-5(a) and those were "judicial" proceedings. Thus, the court held the Army's interpretation of its regulation was the proper one, and respondents were therefore not bound to accept the NTSB findings.

Petitioner's timely filed petition for rehearing, with suggestion for rehearing *in banc*, was denied by the court on May 8, 1986, and May 20, 1986 respectively.

REASON FOR GRANTING THE WRIT

THE CORRECT INTERPRETATION OF ARMY REGULATION 135-175, ¶ 2-5(a), REQUIRES THE UNITED STATES ARMY TO GIVE BINDING EFFECT ON DECISIONS OF THE NATIONAL TRANSPORTATION SAFETY BOARD GERMANE TO AN OFFICER ELIMINATION ACTION.

A review of the decision of the Federal Circuit in the present case will allow the Court the opportunity to resolve a significant conflict between the mission of the United States Army and the purpose of the National

Transportation Safety Board. In doing so, a decision will have telling effect on inter-agency relationships in overlapping cases for all federal agencies. The case focuses on what amounts to a doctrine of administrative collateral estoppel. The court's opinion below has ignored this important component which had been properly recognized by the district court. Accordingly, this Court should reverse the Court of Appeals and affirm the district court decision.

The National Transportation Safety Board, as an ultimate administrative and quasi-judicial authority, performs an imposing national function in regulating air traffic safety, including pilot licensure and certification. See 49 U.S.C., §§ 1901 et seq. In the discharge of that awesome responsibility, the National Transportation Safety Board was required to focus upon petitioner, individually, and determine whether or not he intentionally or fraudulently made misrepresentations of his flying experience in connection with his service in the United States Army. In an entirely forthright analysis, that board concluded that the petitioner was at the most guilty of misunderstanding pertinent regulations, and had not acted wilfully.

On the other hand, the United States Army sought to discharge the petitioner from service on the basis of the identical conduct focused upon by the National Transportation Safety Board, claiming he acted fraudulently and intentionally. When that decision was called to the Army's attention they refused to invoke the provisions of AR 135-175, ¶ 2-5(a), which requires that proper weight be given to the precedential findings of other administra-

tive agencies. The failure of the Army under these circumstances to recognize and give controlling legal effect to the National Transportation Safety Board's decision is not just an insult to that board, but undermines the workings of the federal agency system.

This Court has recognized the need to give the fullest effect possible to final agency decisions. In a case involving a disputed factual question, where the subsequent judicial action had been preceded by an agency determination, this Court stated:

> When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.
>
> *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966).

All that the petitioner requested the United States Army to do was "enforce repose" based upon the National Transportation Safety Board decision and the United States Army's own regulation. It is interesting to note that the United States Army did rely upon some of the transcripts and findings of the Safety Board's decision, but chose to ignore the findings on the seminal issue in petitioner's officer elimination action.

Instead, the Army sought to disregard the effect of the regulation and decision by tendering in the district court a highly technical and largely grammatical analysis of AR 135-175, ¶ 2-5(a). The district court rejected their efforts as being unreasonable, but the Federal Circuit, in the name of deference to the military service, bought the argument lock, stock and barrel. This Court has long

held that the meaning and intent of a regulatory provision must be gleaned from a review and consideration of the phraseology of such provision, as a whole. *Philbrook v. Glodgett*, 421 U.S. 707, 713-714 (1975); *United States v. American Trucking Association*, 310 U.S. 534, 542-543 (1940).

Certainly petitioner acknowledges the need for courts to defer to military decisions, especially when the issue under review is directly related to military matters because "to accomplish its mission the military must foster instinctive obedience, unity, commitment, and *espirit de corps.*" *Goldman v. Weinberger*, — U.S. —, 106 S.Ct. 1310, 1313 (1986). However, in the present case there is deference due the National Transportation Safety Board in the discharge of its important mission as well. Under such circumstances, where governmental decisionmakers conflict, federal courts should not advocate the function of judicial review.

The issue in the present case is one of law, that is, what is the correct interpretation of an Army regulation. Federal District Judge Harold Baker addressed that question of law in the face of claims of Army deference, and resolved it in petitioner's favor. Judge Baker then reviewed the issue as a whole and concluded, as a factual matter, that the Board of Officer's findings that petitioner had falsified documents was manifestly erroneous. The Federal Circuit not only engaged in a "word games" analysis to reject the legal issue of the proper interpretation of the regulation, but also ignored the factual findings of the lower court and concluded that petitioner had falsified

documents. Circuit Courts of Appeal are not free to ignore those factual findings. *Pullman-Standard v. Swint,* 456 U.S. 273 (1982).

In the final analysis, the United States Army has maintained, at all stages of this proceeding, that its decision to discharge an officer is entitled to deference to such an extent that it is unreviewable by a court. Similarly, the decision of the Federal Circuit rests upon a contention that the Army's position on the interpretation of AR 135-175, ¶ 2-5(a), must be accepted by the court. Because neither of these propositions is manifest, this Court should grant review and address the vital inter-agency conflict created by the opinion of the Federal Circuit in this case.

CONCLUSION

On the basis of the foregoing argument and authority, it is respectfully submitted that certiorari should be granted, and the decision of the Federal Circuit Court of Appeals should be reversed.

Respectfully submitted,

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August, 1986

APPENDIX

EXHIBIT A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Appeal No. 85-2629

KENNETH L. WRONKE,

Appellee,

v.

JOHN A. MARSH, AS SECRETARY OF THE ARMY, ET AL.,

Appellants.

DECIDED: April 4, 1986

Before MARKEY, *Chief Judge,* SMITH and NEWMAN, *Circuit Judges.* MARKEY, *Chief Judge.*

Appeal from a judgment of the District Court for the Central District of Illinois, vacating the discharge from the United States Army Reserve (USAR) of Kenneth L. Wronke (Wronke), ordering him reinstated with all rank and privileges to which he would have been entitled had he not been discharged, and awarding him back pay not to exceed $9,999.99. 603 F. Supp. 407 (C.D. Ill. 1985). We reverse.

Background

In October 1977, Wronke, then a non-rated commissioned officer (Major) in the USAR, applied to the Federal

Aviation Administration (FAA) for a civilian pilot's Certificate. Applying under a regulation that waived a flight test for rated military pilots, he presented an Army Flight Record indicating that he had been a rated Army Aviator since November 1967 and had flown 10 hours with his Reserve unit during the preceding month. He also furnished an order showing that he had been placed on flight status by his Reserve unit. Based on those documents, he was given merely a written test by the FAA and was issued a temporary Airman Certificate.

In May 1978, the FAA requested Wronke's USAR Commander to verify his flying status. After checking Wronke's records, the Commander advised the FAA officials that Wronke had never been a rated Army Aviator.

The FAA issued an emergency revocation of Wronke's Certificate, and Wronke obtained an FAA hearing in September 1978. Wronke testified that he was placed on flight status in 1967 while he was in Vietnam, but never saw the order; that his military records were incomplete; that the 10 hours flown with his Reserve unit were flown partly in his own aircraft. The FAA's Administrative Law Judge concluded that he was not a military rated pilot, and did not qualify for a Certificate based on such qualification. The ALJ permanently revoked his Certificate and placed a one-year ban on his making further application.

Wronke appealed the FAA revocation of his certificate to the National Transportation Safety Board (NTSB), which affirmed the revocation on November 13, 1978. In its opinion, NTSB pointed out:

(a) Wronke had obtained the Certificate on the basis of military piloting record data and therefore

without a flight test under § 61.73 of the Federal Aviation Regulations, the regulation governing applications by *rated military pilots.*

(b) Neither of the two military aircraft he claimed to have flown were in service during the period involved.

(c) Safety in the air and the public interest required affirmation of the revocation.

(d) Though Wronke submitted documents showing his rating in fixed wing aircraft on November 28, 1967 and in rotary wing aircraft on April 16, 1976, and an invalid Special Order confirming his "aviator profile", Wronke is not a military rated pilot.

NTSB modified the one-year ban on re-applying, however, saying:

> In the absence of any probative evidence that respondent's application was based on a deliberate intent to mislead the FAA,[14] we are not persuaded that barring a new application for a full year would serve any meaningful safety purpose. Furthermore, respondent's extensive use of the privileges of an airman certificate would aggravate the effect of a full year's grounding.[15] We also note that the Administrator's counsel, both during interrogation at the hearing and in his reply brief, has indicated a willingness to shorten the 1 year period of ineligibility. In view of the above circumstances, we believe respondent should be allowed to re-apply for appropriate airman certification, in the standard manner rather than under section 61.73, and

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[14] Rather, it appears the application was more the result of a lack of understanding of pertinent FAA and military standards.

[15] Respondent is a fixed base operator, and also flies frequently in his occupation as a veterinarian and in his continuing affiliation with the military reserve.

we urge the Administrator to consider any such application submitted by respondent following issuance of this order.

On November 5, 1979, Wronke was recommended for discharge from the USAR under Army Regulation (AR) 135-175 for conduct unbecoming an officer, falsification of official military records and fraudulent preparation of the two documents he had submitted to the FAA.

On January 10, 1981, Wronke, with counsel, appeared before a Board of Officers (Elimination Board) to show cause why he should not be discharged. Wronke testified that he had served in Korea with the Navy as an underwater demolition technician; that after he was commissioned, he served in Vietnam, and was attached to the 184th Recon Airplane Company; that his duty was Veterinarian; that he did fly while attached to the 184th; that he flew during the Tet offensive when they were caught unaware and they needed him; that he flew 230 missions in the OH 13 aircraft; that he never saw orders designating him a pilot; that he did not receive flight pay. Other military personnel testified that a Flight Record (DA Form 759, one of Wronke's fraudulently prepared documents) had not been prepared on Wronke; that he was not a rated military pilot; that it would have been improper to prepare a Flight Record for him; and that Wronke's records do not show that he was ever attached to the 184th Recon Airplane Company.

The Board of Officers unanimously found that Wronke had engaged in conduct unbecoming an officer when he: (1) intentionally submitted a false official statement for the purpose of misrepresentation to the FAA; (2) supplied inaccurate information to persons in his organization

for use in preparation of orders; (3) failed in his obligation as an officer to recognize and correct official records of his qualifications; (4) adopted records containing misleading and inaccurate information and presented them to a government body for purposes of obtaining a pilot's license on the basis of a non-existent military pilot rating. The board recommended Wronke's general discharge under honorable conditions. Wronke received that discharge to be effective June 14, 1982.

On July 2, 1982, Wronke sued in the District Court. That suit was dismissed for failure to exhaust military remedies. Wronke appealed to the Court of Appeals for the Seventh Circuit, which affirmed the dismissal.

While the appeal was pending in the Seventh Circuit, Wronke applied to the Army Board for Correction of Military Records (ABCMR), seeking to vacate his discharge and relying primarily on the NTSB's statement that his "application was more the result of a lack of understanding of pertinent FAA and military standards." In April 1983, the ABCMR found Wronke's conduct unbecoming that of an officer, held that the NTSB's statement was not binding on the Army, and, after reviewing the entire record, refused to vacate Wronke's discharge.

On August 11, 1983, Wronke sued again in the district court, where the parties lodged cross motions for summary judgment.

The District Court's Decision

The district court rested its decision on two foundations. The first was this part of NTSB's statement about the one-year re-application restriction:

In the absence of any probative evidence that respondent's application was based on a deliberate intent to mislead the FAA,[14] we are not persuaded that barring a new application for a full year would serve any meaningful safety purpose.

---

[14] Rather, it appears the application was more the result of a lack of understanding of pertinent FAA and military standards.[1]

The second foundation was the district court's interpretation of paragraph 2-5(a) of AR 135-175:

> 2-5(a) No officer will be considered for elimination for the reasons in paragraph 2-11 or 2-12 because of conduct that has been the subject of judicial proceedings resulting in an acquittal based on the merits of the case or in an action having the same effect.[2]

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[1] The district court may not have had called to its attention that NTSB was dealing only with the one year restriction, that Wronke needed a Certificate as a fixed base operator, and that FAA's counsel had recommended lifting the restriction, and that the restriction was deemed unnecessary as a *safety* measure. The gratuitous statement that Wronke did not intend to mislead when he submitted falsified records to get a Certificate without a flight test (when no reason other than intent to mislead, such as accident, was presented) was uncritically accepted, as was the notion that a field grade officer of many years service did not understand military standards.

[2] Wronke was eliminated for violations of paragraphs 2-12(d) and 2-12(o) of Section II of AR 135-175, "REASONS WHICH REQUIRE ELIMINATION":

> 2-12. *Moral or professional dereliction.* While not all-inclusive, existence of one of the following or similar conditions, unless successfully rebutted, authorizes elimination of an officer due to moral or professional dereliction. Officers discharged for any of the following reasons may be furnished an Honorable, General, or Other Than Honorable Discharge Certificate:
>
> * * *

(Continued on next page)

The district court recognized the Army's interpretation of paragraph 2-5(a):

> The defendant alleges that the NTSB proceedings were not judicial proceedings, and they were also not "an action having the same effect" under the provisions of AR 135-175, Para. 2-5(a). Defendants opine that the thrust of the provision is to prevent an elimination action against an officer who has been successful in judicial proceedings whether as the result of an acquittal or of some other action, such as a dismissal at trial on certain motions that have the same effect.

603 F. Supp. at 412. The court also recognized the established rules governing judicial review of the Army's interpretation of its own regulations:

> Where the meaning of a regulation is in question, the Army's own interpretation of its regulations must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation. (Citations omitted.) If the applicable regulations are interpreted by the Army in a reasonable manner, any charge of procedural irregularity must fail even though the petitioner may present another reasonable interpretation of the regulations. (Citation omitted.) Thus where a military regulation is susceptible to equally reasonable constructions, a court may not substitute an alter-

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(Continued from previous page)

(d) Intentional omission or misstatement of facts in official statements or records, for the purpose of misrepresentation.

* * *

(o) Conduct unbecoming an officer.

(p) When one or more of the reasons in a through *n* above is alleged and the circumstances on which they were based indicated that the reason in o above also is involved, it will constitute additional reason for requiring elimination.

native interpretation for the interpretation of the military service. (Citation omitted.)

Nonetheless, the court went on to say that the Army's interpretation was unreasonable, plainly erroneous, inconsistent with the regulation and untenable. Substituting its own interpretation, the court held that NTSB's statement was binding on the Army:

> The court, however, does not find the Army's interpretation of AR 135-175 Para. 2-5(a) to be a reasonable interpretation and the court instead finds that the Army's interpretation is plainly erroneous and inconsistent with the wording of the regulation. The court has examined the opinion and order of the NTSB and finds it to be "an action having the same effect" as a "judicial proceeding resulting in an acquittal based on the merits". The court finds the defendants' reading of AR 135-175 Para. 2-5(a) to be untenable. It is apparent to the court that the "action having the same effect" phrase in the paragraph refers to proceedings with results that are similar to judicial proceedings resulting in an acquittal based on the merits. The opinion and order of the NTSB is such an action and therefore any finding by that body would be binding upon the Elimination Board and the ABCMR under Para. 2-5(a).
>
> In the NTSB proceedings it was found that there was an absence of any probative evidence that Wronke's application to the FAA for a commercial pilot license was based on any deliberate intent to mislead the FAA and was more the result of the lack of an understanding of pertinent FAA and military standards. The charges against plaintiff Wronke in the Board's elimination hearing, whose decision to eliminate the plaintiff was subsequently approved by the ABCMR, were based on AR 135-175 Paras. 2-12(d) and 2-12(o). Paragraph 2-12(d) states that an officer may be eliminated from the Army Reserves where he

> has committed an "intentional omission or misstatement of facts in official statements or records, for the purpose of misrepresentation." The finding by the NTSB, that there was no probative evidence that Wronke's application was based on a deliberate intent to mislead, bars under AR 135-175 Para. 2-5(a) a finding that Wronke "intentionally omitted or misstated facts and official statements or records for the purpose of misrepresentation." AR 135-175 Para. 2-5(a) operates to estop a finding by the Elimination Board and the ABCMR that Wronke intentionally omitted or misstated facts in his application for a commercial pilot's license for the purpose of misrepresentation of his past military flying record.

Id. at 412-13. The district court concluded the opinion accompanying its order with:

> As the substance of the Elimination Board's finding of conduct unbecoming an officer relied on the determination that plaintiff Wronke had deliberately intended to mislead the FAA, the findings of the NTSB also operate, pursuant to AR 135-175 Para. 2-5(a), to estop the Elimination Board's determination that Wronke had committed conduct unbecoming an officer.

The court rejected the Army's argument that the paragraph 2-12(o) charge of conduct unbecoming an officer was based on more than the paragraph 2-12(d) charge, saying the 2-12(o) charge was also based on Wronke's submission of a fraudulent flight record for the purpose of misrepresenting himself to the FAA.[3] *Id.* at 413.

The district court then granted Wronke's motion for summary judgment.

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[3] The court did not discuss paragraph 2-12(p), *supra*, note 1. Nor did it refer to findings (2) and (3) of the Board of Officers, *supra*.

The Appeal

The Army appealed to the Court of Appeals for the Seventh Circuit. Realizing that Wronke had limited damages to bring his case within the Tucker Act, 28 U.S.C. § 1346(a)(2), the Army moved for transfer of the appeal to this court. Over Wronke's objection, the Court of Appeals granted the motion and transferred the appeal to this court under 28 U.S.C. § 1631. *Wronke v. Marsh*, 767 F.2d 354 (7th Cir. 1985).

Issue

Whether the district court erred in granting Wronke's motion for summary judgment.

(1) *Introduction*

A military officer's commission states that the President reposes "special trust and confidence" in the qualities of the person commissioned. Military commanders must make numerous decisions in reliance on information and records supplied by subordinate officers. Decisions made on false information lose not just battles, but lives.

In the present case, a military reserve officer indisputably falsified official military records. He was discharged. The district court ordered the Army to restore his commission in the belief that the Army had violated its own regulation, as the court interpreted that regulation. The case thus turns on the correctness of the court's interpretation of the regulation.

OPINION

(1) *Paragraph 2-5(a)*

(a) *English Grammar*

As in the interpretation of statutes, *Board of Governors v. Dimension Financial Corp.*, — U.S. —, —, 106 S. Ct. 681, 686 (1986), we begin, as we must, with the plain language of the regulation. *General Electric Co. v. United States*, 610 F.2d 730, 734 (Ct. Cl. 1979). Neither the district court nor Wronke has anywhere stated that that language is unclear or ambiguous, and it is neither. Nor has either the district court or Wronke suggested any basis or need for looking outside the regulation for clarification. Neither has asserted that the regulation was contrary to statute, or was issued without authority, or that the Army's interpretation is contrary to congressional intent.

The district court simply misread paragraph 2-5(a), the key phrase of which it saw as "judicial proceedings resulting in an acquittal based on the merits of the case or in an action having the same effect." Under the standard rules of grammar, *see* Leggett, Mead & Charvat, *Prentice-Hall Handbook for Writers* (6th ed. 1974); S. Baker, *The Complete Stylist and Handbook* (3rd ed. 1984), the noun "proceedings" is restricted by the adjective "judicial", and the entire phrase must be read as limited to *judicial proceedings*. *See* C. D. Sands, *Sutherland Statutory Construction*, § 47.17 (4th ed. 1973).

The present participle "resulting" relates to "judicial proceedings" and is followed by two modifying paralleled prepositional phrases "in an acquittal" and "in an action", separated by the disjunctive "or". Those ele-

ments must therefore be read as "resulting in an acquittal or resulting in an action".

The phrase "based on the merits of the case" modifies "acquittal", and "having the same effect" modifies "action". Because "acquittal" and "action" are interchangeable objects of the preposition "in", the wording, though it would be more cumbersome, could just as well have been "resulting in an action having the same effect as an acquittal or in an acquittal." The rules of English grammar require that "the same effect" be read as "the same effect as an acquittal".

With otherwise unnecessary words inserted for understanding, therefore, the entire phrase must under the rules of English grammar be read as "judicial proceedings resulting in an acquittal based on the merits of the case or *judicial proceedings resulting* in an action having the same effect *as an acquittal based on the merits of the case*".

Only one type of "proceedings" is present in paragraph 2-5(a), and those are "judicial" proceedings. Even then, only those judicial proceedings that have one of two specified results are applicable: those judicial proceedings that result in an acquittal on the merits; and those judicial proceedings that result in an action having the same effect as an acquittal on the merits.

In constructing its interpretation, the district court said it *found* that the "opinion and order of the NTSB" is "an action having the same effect", and that "an action having the same effect" refers to "proceedings with results that are similar to judicial proceedings resulting in an acquittal based on the merits". As findings, interpretive or otherwise, those findings are clearly erroneous. As

an interpretation, they amount to error as a matter of law. First, those findings/interpretation totally disregard the order of the paragraph's wording. Second, they totally disregard the preposition "in" before "an action". Third, they create without warrant a second "proceedings" noun and inject it into a single sentence dealing only with *judicial* proceedings.

The formulation envisaged by district court would have the key phrase of paragraph 2-5(a) read: "judicial proceedings resulting in an acquittal based on the merits of the case or an action having the same effect as judicial proceedings resulting in an acquittal based on the merits of the case". The difficulty is two-fold. First, neither English usage, nor fairness to the drafter of the regulation, can countenance disregard of the second preposition "in" and its tie to "judicial proceedings resulting". Second, the court's formulation will not fit the rest of the paragraph, in which "judicial proceedings" is preceded by "conduct that has been the subject of". It is simply impermissable (sic) to re-write the single sentence constituting paragraph 2-5(a) by replacing the second "in" with "the subject of".

It would, of course, have been possible for the Army to have written paragraph 2-5(a) as:

> No officer will be considered for elimination for the reasons in paragraph 2-11 or 2-12 because of conduct that has been the subject of judicial proceedings resulting in an acquittal based on the merits of the case, or that has been the subject of other proceedings with results that are similar to judicial proceedings resulting in an acquittal based on the merits.

But the Army did not write its regulation that way. On the contrary, it wrote a single sentence, easily understood as standard English usage.

No warrant, no reason, no rule of grammatical construction, and no legislative or regulatory history supports the reading of that sentence adopted by the district court, and the court gave none in its opinion. Nor did the court supply any textual or legal analysis supporting its reading of the regulation.

On the basis of English grammar, the district court erred in its reading of paragraph 2-5(a) of AR 135-175. It based its holding that the Army was bound by NTSB's view on that erroneous reading and that holding must therefore be reversed.

(b) The Army's Interpretation

The Army interpreted paragraph 2-5(a) of its own regulation as limited to judicial proceedings. That interpretation was entitled to judicial deference. *United States v. Clark*, 454 U.S. 555, 565 (1982). That deference was especially appropriate here, where the Army was determining the suitability of a commissioned officer. *Maier v. Orr*, 754 F.2d 973, 984 (Fed. Cir. 1984) (fitness for duty); *see Orloff v. Willoughby*, 345 U.S. 83, 93 (1953) (judges not given the task of running the Army). In *Wallace v. Chappell*, 462 U.S. 296 (1982). the Supreme Court observed that "the special relationships that define military life have 'supported the military establishment's broad power to deal with its own personnel. The most obvious reason is that courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have.'" *Id.* at 305 (citation omitted); *see*

Williams v. Secretary of the Navy, No. 85-2690, slip op. at 19-22 (Fed. Cir. Mar. 18, 1986). In light of that "broad power," the district court should have afforded the Army's interpretation of AR 135-175 great deference in a matter as sensitive as the continued suitability of Wronke to serve as a commissioned officer. On this record, the district court erred as a matter of law in refusing to grant the deference normally due the Army's interpretation of its own regulation.

(c) The ABCMR Determination

Under the precedent in this court, Wronke was bound by the ABCMR's determination that he was unsuitable, unless he established that that determination was arbitrary, capricious, contrary to law, or unsupported by substantial evidence, *Heisig v. United States,* 719 F.2d 1153, 1156 (Fed. Cir. 1983); *Sanders v. United States,* 594 F.2d 804, 811 (Ct. Cl. 1979), and unless he did so by "cogent and clearly convincing evidence." *Dorl v. United States,* 200 Ct. Cl. 626, 633, *cert. denied,* 414 U.S. 1032 (1973). Wronke made no effort to meet that burden and the district court did not discuss it.

(d) Wronke's Presentation on Appeal

Ignoring the district court's total focus on paragraph 2-5(a), Wronke attempts to buttress the judgment appealed from with general assertions of collateral estoppel. In arguing that the Army was estopped from considering his suitability, Wronke presumes a non-existent relationship between the NTSB's parenthetical remarks about his intent before the FAA and the charges brought against him by the Army, which included falsification of Army records.

The NTSB never addressed Wronke's intent in falsifying those Army records, nor, of course, did it address his conduct as an officer or his fitness to continue serving as one. The NTSB proceeding, at which the Army was not fully represented, and which had nothing to do with Wronke's suitability as an Army officer could not possibly constitute an estoppel requiring the Army to retain Wronke.

Wronke offers no textual or legal arguments in support of the district court's interpretation of paragraph 2-5 (a), but is content to attack the Army's interpretation as "highly technical and purportedly grammatical" and as merely "trying to move the words and phrases." That attack is totally lacking in merit.

Wronke's arguments for district court jurisdiction on a basis other than 8 U.S.C. § 1346(a)(2) are simply wrong. *See Lee v. Thornton*, 420 U.S. 139, 140 (1975); *Sherwood v. United States*, 312 U.S. 584, 591 (1941).

CONCLUSION

The district court erred as a matter of law in interpreting paragraph 2-5(a) of AR 135-175 as not limited to judicial proceedings. Its judgment must therefore be reversed. Because the appeal is from a summary judgment, the case must be remanded for such further proceedings not inconsistent with this opinion as the district court may deem necessary.

REVERSED AND REMANDED

EXHIBIT B

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Appeal No. 85-2629

KENNETH L. WRONKE,

Appellee,

v

JOHN A. MARSH, AS SECRETARY OF THE ARMY, ET AL.,

Appellants.

Before MARKEY, *Chief Judge,* SMITH and NEWMAN, *Circuit Judges.*

ORDER

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

FOR THE COURT

/s/ Francis X. Gindhart,
Clerk

5/8/86
Date

cc: Mr. John S. Groat, DOJ

Mr. J. Steven Beckett

EXHIBIT C

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Appeal No. 85-2629

KENNETH L. WRONKE,

Appellee,

v.

JOHN A. MARSH, AS SECRETARY OF THE ARMY, ET AL.,

Appellants.

Before MARKEY, *Chief Judge,* SMITH and NEWMAN, *Circuit Judges.*

ORDER

A suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc is declined.

FOR THE COURT

By: /s/ Diane Frye,
Chief Deputy Clerk
Francis X. Gindhart, Clerk

5-20-86
Date

cc: Mr. John S. Groat, DOJ
Mr. J. Steven Beckett

EXHIBIT D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

No. 83-2339

KENNETH L. WRONKE,
Plaintiff,

vs.

JOHN O. MARSH, et al.,
Defendants.

ORDER

(Filed February 28, 1985)

I. FACTUAL BACKGROUND AND PRIOR PROCEEDINGS

The plaintiff, Kenneth L. Wronke, was a major in the United States Army Reserve until May 27, 1982, when he received a General Discharge for violating Army Regulation (AR) 135-175 Paragraphs 2-12(d) and 2-12(o), because he had misrepresented his qualifications as a military pilot in endeavoring to obtain a commercial pilot's license from the Federal Aviation Administration (FAA) and because his conduct was unbecoming an officer.

After the plaintiff received his commercial pilot's license from the FAA in October 1977, the FAA became aware that Wronke was not a "Rated Army Aviator", as he represented in his license application. His civilian commercial pilot's license, therefore, was revoked in August 1978 and the plaintiff was not allowed to apply again for the commercial license for one year. The revocation was

upheld by the National Transportation Safety Board (NTSB) In November 1978; it determined, however, that the plaintiff had not acted willfully in his misrepresentations, and therefore he could apply again for the civilian license without waiting a year. Wronke did so apply and he subsequently received a civilian commercial pilot's license.

On December 7, 1979, the plaintiff was notified by the Commander of the Fifth Army that an Officer Elimination Action had been initiated against him because of his violations of Paragraphs 2-12(d) and 2-12(o) of AR 135-175. The Elimination Board after considering testimony and exhibits, voted unanimously on January 10, 1981, to recommend Wronke's elimination from the United States Army Reserve with a General Discharge under Honorable Conditions. The Board's recommendation was reviewed and accepted by the Commander of the Fifth Army. In June, 1982, the plaintiff received a discharge order effective June 14. 1982.

On July 2, 1982, the plaintiff filed a complaint with this court, No. 82-2218, seeking declaratory and injunctive relief. Wronke alleged that the Army had violated its own regulations in convening and carrying out the Elimination Board's hearing; Wronke also challenged the hearing proceedings on procedural and substantive due process grounds. In an opinion accompanying the dismissal without prejudice of the plaintiff's action, the court found that the plaintiff had not exhausted his intraservice administra-

tive remedies under 10 U.S.C. § 1552 as he had not appealed the Elimination Board's decision to the Army Board for Correction of Military Records (ABCMR). The court further found that a preliminary injunction was not warranted, as the court was unable to find irreparable injury or absence of an adequate remedy at law. *See* Order of July 29, 1982, No. 82-2218. The Court of Appeals for the Seventh Circuit affirmed this court's decision in an unpublished order, No. 82-2248, entered June 1, 1983.

Pending the appeal to the Seventh Circuit, the plaintiff sought review from the ABCMR. On April 8, 1983, a memorandum of consideration and decision of the ABCMR was issued to the plaintiff, denying the plaintiff's request for correction of his military records to show that the action taken to discharge him from his commission in the United States Army Reserve was void and of no force or effect. On August 11, 1983, the plaintiff again filed a complaint with this court. On October 2, 1984, the plaintiff moved for summary judgment; on December 3, 1984, the defendants' (sic) cross-moved for summary judgment in favor of the defendants, stating that there is no genuine issue as to any material fact and that the defendants are entitled to a judgment as a matter of law.

II. JURISDICTION

The plaintiff alleges that this court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343, in that the controversy arises under the constitution and laws of the United States. This is an action pursuant to 28 U.S.C. § 2201 and 2202 to secure declaratory relief, and to secure equitable relief pursuant to 5 U.S.C. § 705. The court finds

that it has jurisdiction under these provisions. The court also notes that the Mandamus Act, 28 U.S.C. § 1361, gives the district courts "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States to perform a duty owed to the plaintiff." *Flynn v. Shultz,* 748 F.2d 1186, 1189 (7th Cir. 1984). Courts have held that this statute confers jurisdiction over a suit for declaratory and injunctive relief from a discharge allegedly made in violation of Army regulations. *Konn v. Laird,* 460 F.2d 1318, 1319 (7th Cir. 1972); *Jones v. Alexander,* 609 F.2d 778, 781 (5th Cir. 1980) *cert. denied* 449 U.S. 832 (1980); *Woodard v. Marsh,* 658 F.2d 989, 992 (5th Cir. 1981). The statute also confers jurisdiction over allegations that the Army failed to perform duties imposed by the Constitution. *See Konn,* 460 F.2d at 1319 (the failure of the Army to follow its own regulations constitutes a deprivation of due process, and mandamus is available to remedy the consequences thereof); *see also Woodard,* 658 F.2d at 992. This court, therefore, has jurisdiction over Wronke's claims for declaratory and injunctive relief.

This court also has jurisdiction over Wronke's monetary claims. The Tucker Act gives district courts original jurisdiction of a "civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the constitution, or any Act of Congress, or any regulation of an executive department. . . ." 28 U.S.C. § 1346 (a)(2). In an amendment to his complaint, filed February 13, 1984, Wronke waived all claims for damages in excess of $9,999.99. Therefore, the court has jurisdiction of his monetary claims.

III. REVIEWABILITY

Having determined that this court possesses jurisdiction to hear this case, the question becomes whether the court should review the military decision to terminate the plaintiff's position in the United States Army Reserve. Decisions of the ABCMR "denying corrective action" are reviewable by the federal courts. *See Diliberti v. Brown,* 583 F.2d 950, 952 (7th Cir. 1978); *Ballenger v. Marsh,* 708 F.2d 349, 350 (8th Cir. 1983); *Neal v. Secretary of Navy,* 639 F.2d 1024, 1036-37 (3rd Cir. 1981); *Natelovich v. Secretary of Air Force,* 591 F.2d 852, 859 (D.C. Cir. 1978); *Hodges v. Callaway,* 499 F.2d 417, 423 (5th Cir. 1974); *Sanford v. United States,* 399 F.2d 693, 694 (9th Cir. 1968). In determining whether to review internal military decisions, a federal court should first determine whether the plaintiff has exhausted his intraservice administrative remedies and has properly alleged that the military has violated the constitution, a statute, or its own regulations; second, the court must balance sufficiency of the complaint against the policies contravening for review. *Mindes v. Seaman,* 453 F.2d 197, 201-02 (5th Cir. 1971). *See Helm v. State of California,* 722 F.2d 507, 509-10 (9th Cir. 1983); *Rucker v. Secretary of Army,* 702 F.2d 966, 969 (11th Cir. 1983); *Neiszner v. Mark,* 684 F.2d 562, 563-64 (8th Cir. 1982), *cert. denied* 460 U.S. 1022 (1983); *Johnson v. Reed,* 609 F.2d 784, 789 (5th Cir. 1980). As the plaintiff has appealed the Elimination Board's decision to the ABCMR and the appeal was denied, the plaintiff has exhausted his intraservice administrative remedies pursuant to 10 U.S.C. § 1552. The plaintiff has also properly alleged that the Elimination Board and the ABCMR violated his rights un-

der the Constitution and that they violated their own regulations.

In balancing the sufficiency of the complaint against the policies contravening review, the district court must look to the following factors: (1) the source and weight of the plaintiff's challenges; (2) the injury to the plaintiff if relief is denied; (3) the amount of interference with military matters if relief is granted; and (4) the degree to which expertise and discretion is involved. *See Mindes,* 453 F.2d at 201-02; *Rucker,* 702 F.2d at 969; *Johnson v. Reed,* 609 F.2d at 789.

Wronke's claim is a substantial one. The substance of Wronke's claims is that the Elimination Board failed to follow the proper hearing procedures in deciding his case. More specifically Wronke claims the Elimination Board failed to follow Army regulation, AR 135-175 Para. 2-5(a), which would have required a finding that he had not in fact violated AR 135-175 Pars. 2-12(d) and 2-12(o). Review is particularly appropriate where a challenged action is alleged to have violated a particular service's own regulation. *See Konn v. Laird,* 460 F.2d at 1319; *Hickey v. Commandant of Fourth Naval District,* 461 F. Supp. 1085, 1091 (E.D. Pa. 1978). Wronke's claim of violation of due process stems directly from the question whether he was entitled to certain rights under the applicable Army regulations and for this court to make that determination it would have to go no further than an examination of the Army regulations.

As to the second factor, injury to the plaintiff if relief is denied, this court finds that the harm that would flow to the plaintiff is substantial, and would include reduction or

elimination of certain veteran benefits, loss of promotion, and of course, discharge from the Army Reserve itself.

As to the third factor, the amount of interference with military matters if relief is granted, the court finds that any interference would be minimal as any order to be issued from this court would only require the Army to follow its own regulations.

As to the fourth factor, balancing the sufficiency of the complaint against the policies contravening review, the degree to which military expertise and discretion is involved, the language of the regulations regarding the procedures and standards to be employed during the Elimination Board hearing does not involve any military expertise and the Elimination Board's discretion in the implementation of the regulations is limited.

The court, therefore, finds that Wronke's claims of violation of due process and Army regulations are appropriate for review.

IV. MERITS

Once it has been determined that review is proper, the standard for review of actions and procedures of a Military Records Corrections Board is whether the actions and procedures were arbitrary, capricious, unsupported by substantive evidence, or contrary to law and regulation. *See Dilley v. Alexander,* 603 F.2d 914, 920 (D.C. Cir. 1979); *Nolen v. Rumsfeld,* 535 F.2d 888, 890 (5th Cir. 1976), *cert. denied* 429 U.S. 1104 (1977); *ben Shalom v. Secretary of Army,* 489 F. Supp. 964, 971 (E.D. Wisc. 1980); *Kalista v. Secretary of Navy,* 560 F. Supp. 608, 612 (D. Colo. 1983); *Dumas v. The President of the United States,* 554 F. Supp.

10, 16 (D. Conn. 1982). Review of the actions and procedures of the ABCMR is not limited to the record of the Corrections Board; the record of previous precedings (sic) before other military bodies may also be reviewed. *See Kalista,* 560 F. Supp. at 612.

While the plaintiff's complaint for declaratory and injunctive relief raises numerous claims for violation of the plaintiff's rights under the Fifth Amendment due process clause as well as concerning the Elimination Board's failure to follow several different Army regulations, this court will focus on only one claim of the plaintiff which the court finds to be dispositive of the case at hand.

AR 135-175 Para. 2-5(a) provides that "no officer will be considered for elimination for the reasons in Paragraph 2-11 or 2-12 because of conduct that has been the subject of judicial proceedings resulting in an acquittal based on the merits of the case or in an action having the same effect." In proceedings before the NTSB, concerning the revocation of the plaintiff's commercial pilot's license by Administrative Law Judge Fowler on October 27, 1978, the revocation of the license was upheld by the NTSB. An order by the ALJ that prohibited the plaintiff from applying for a new license for a one-year period was vacated, however. The NTSB stated that:

> In the absence of any probative evidence that respondent's application was based on a deliberate intent to mislead the FAA,[14] we are not persuaded that barring a new application for a full year would serve any meaningful safety purpose.

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[14] Rather, it appears the application was more the result of a lack of understanding of pertinent FAA and military standards.

See NTSB Opinion and Order, No. EA-1211 (adopted November 13, 1978).

The plaintiff claims that in the officer elimination action before the Elimination Board, the substance of the charged offenses against the plaintiff required proof of intentional misrepresentation or knowing fraudulent conduct. The plaintiff states that the finding of the NTSB that there was no probative evidence that the respondent's application to the FAA was based on any deliberate intent to mislead, has the same effect as an acquittal and under AR 135-175 Par. 2-5(a) should therefore serve as a bar to the elimination action. The ABCMR specifically found, however, that the "decision made by that Board [NTSB] was not binding on the military". *See* ABCMR Memorandum of Consideration and Decision, Docket No. AC82-10426 (January 12, 1983) at 6.

The defendants claim that the ABCMR and Elimination Board were not bound by the NTSB decision. They state that "[t]here is no doctrine of administrative collateral estoppel, and the board of officers was not bound by the independent although related findings of the NTSB." *See* Memorandum of Points and Authorities in Support of Defendants' Opposition to Plaintiff's Motion for Summary Judgment and Defendants' Cross-Motion for Summary Judgment, at 23. The defendant alleges that the NTSB proceedings were not judicial proceedings, and they were also not "an action having the same effect" under the provisions of AR 135-175 Para. 2-5(a). Defendants opine that the thrust of the provision is to prevent an elimination action against an officer who has been successful in judicial proceedings whether as the result of an acquittal or of some

other action, such as the dismissal at trial on certain motions that have the same effect.

Although a district court's scope of review is limited where military decisions are involved, a court may review such decisions to insure that military regulations are followed. *White v. Callaway,* 501 F.2d 672, 674 (5th Cir. 1974); *Wells v. Commander of Third Battalion,* 441 F. Supp. 336, 339 (E.D. Mo. 1977). Where the meaning of a regulation is in question, the Army's own interpretation of its regulations must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation. *See Harris v. Brown,* 470 F. Supp. 250, 253 (W.D. Mo. 1979) (*citing U. S. v. Larionoff,* 431 U.S. 864 (1977)); *see Hodges v. Callaway,* 499 F.2d at 423 (Army ought to be primary authority for the interpretation of its own regulations). If the applicable regulations are interpreted by the Army in a reasonable manner, any charge of procedural irregularity must fail even though the petitioner may present another reasonable interpretation of the regulations. *See Cunningham v. Hoffman,* 420 F. Supp. 325, 328 (M.D. Tenn. 1976). Thus where a military regulation is susceptible to equally reasonable constructions, a court may not substitute an alternative interpretation for the interpretation of the military service. *See McCort v. Culkin,* 473 F. Supp. 1247, 1250 n.6 (E.D. Pa. 1979) (*citing Keister v. Resor,* 462 F.2d 471 (3rd Cir. 1972), *cert. denied* 409 U.S. 894 (1972)).

The court, however, does not find the Army's interpretation of AR 135-175 Para. 2-5(a) to be a reasonable interpretation and the court instead finds that the Army's interpretation is plainly erroneous and inconsistent with the wording of the regulation. The court has examined the opinion and order of the NTSB and finds it to be "an action

having the same effect'' as a ''judicial proceeding resulting in an acquittal based on the merits''. The court finds the defendants' reading of AR 135-175 Para. 2-5(a) to be untenable. It is apparent to the court that the ''action having the same effect'' phrase in the paragraph refers to proceedings with results that are similar to judicial proceedings resulting in an acquittal based on the merits. The opinion and order of the NTSB is such an action and therefore any finding by that body would be binding upon the Elimination Board and the ABCMR under Para. 215(a).

In the NTSB proceedings it was found that there was an absence of any probative evidence that Wronke's application to the FAA for a commercial pilot license was based on any deliberate intent to mislead the FAA and was more the result of the lack of an understanding of pertinent FAA and military standards. The charges against plaintiff Wronke in the Board's elimination hearing, whose decision to eliminate the plaintiff was subsequently approved by the ABCMR, were based on AR 135-175 Paras. 2-12(d) and 2-12(o). Paragraph 2-12(d) states that an officer may be eliminated from the Army Reserves where he has committed an "intentional omission or misstatement of facts in official statements or records, for the purpose of misrepresentation.'' The finding by the NTSB, that there was no probative evidence that Wronke's application was based on a deliberate intent to mislead, bars under AR 135-175 Para. 2-5(a) a finding that Wronke ''intentionally omitted or misstated facts and official statements or records for the purpose of misrepresentation.'' AR 135-175 Par. 2-5(a) operates to estop a finding by the Elimination Board and the ABCMR that Wronke intentionally omitted or misstated facts in his application for a commercial pilot's li-

cense for the purpose of misrepresentation of his past military flying record.

The plaintiff Wronke was also charged under AR 135-175 Para. 2-12(o), which states that reserve officers may be eliminated for "conduct unbecoming an officer." The defendants have argued that even if the findings by the NSTB are determining to estop the application of 2-12(d) to Wronke, the NTSB determination still does not estop any decision by the Elimination Board that Wronke's conduct was unbecoming an officer. The defendants claim that the Elimination Board considered other questionable conduct of Wronke besides the application for the commercial pilot's license in its determination that he committed conduct unbecoming an officer. An examination of the transcript of the Elimination Board hearing, however demonstrates that the Elimination Board determined that Wronke had committed conduct unbecoming an officer because he had intentionally misstated his service flight record for the purpose of misrepresenting himself to the FAA. *See* Officer Elimination Board Hearing Transcript, *In the Matter of: Major Kenneth L. Wronke* (January 10, 1981) at 213-227. As the substance of the Elimination Board's finding of conduct unbecoming an officer relied on the determination that plaintiff Wronke had deliberately intended to mislead the FAA, the findings of the NSTB also operate, pursuant to AR 135-175 Para. 2-5(a), to estop the Elimination Board's determination that Wronke had committed conduct unbecoming an officer.

V. CONCLUSION

The court finds that the ABCMR and the Elimination Board failed to follow AR 135-175 Para. 2-5(a), which required them to give full faith and credit to the determina-

tion of the NTSB that Wronke had not deliberately intended to mislead the FAA in his application for a commercial pilot's license. If the Elimination Board and the ABCMR had complied with AR 135-175 Para. 2-5(a), the charges against Wronke would have been dismissed. The discharge order given to the plaintiff, effective June 14, 1982, is therefore vacated. The defendants are ordered to reinstate the plaintiff to all rank and privileges to which he would have been entitled but for the proceedings before the Elimination Board and his subsequent discharge. The defendants are also ordered to tender to the plaintiff all back pay owed to him not exceeding the amount of $9,999.99. The Clerk shall enter judgment accordingly.

IT IS SO ORDERED.

ENTER this 28th day of February, 1985.

/s/ Harold A. Baker
Chief Judge